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UNDERSTANDING THE RELATIONSHIP BETWEEN CANADIAN LAW AND SETTLER-COLONIAL LAND ONTOLOGIES FOR CONTEMPORARY DECOLONISATION MOVEMENTS

by Marisa Turner

Introduction

Since the arrival of settler colonialism in Canada, Indigenous nations have struggled to obtain European provincial authorities' recognition of their land rights and sovereignty. However, the *Delgamuukw* case brought before the Canadian Supreme Court in 1997 by the Gitxsan and Wet'suwet'en nations represented a critical turning point for treaty negotiations between the state and First Nations people. For the first time, this decision formally recognised the First Nations' right to land beyond their occupancy and use of that land.[1] The centrality of land in this court case and for contemporary Indigenous sovereignty raises the central question of this paper: How do different attitudes towards land highlight the legacy of colonisation and possibilities of decolonisation?

In this paper, I use a decolonial framework to reveal the power of legality in the settler-colonial states' legitimation of ontological occupation. Using the 1997 Delgamuukw decision and the Coastal GasLink Pipeline as my case studies, I argue that the historical interrelationship between settler-colonial land ontologies and Canadian law during the process of colonisation has influenced the Canadian court system in ways that limit possibilities for decolonisation, and recognition of Indigenous sovereignty.

I structured this paper as follows: First, I provide a brief overview of the interdisciplinary literature that pertains to settler-colonialism, including its associated logics, practices, and legacies. I then explore the differences between Indigenous land ontologies and settler-colonial land ontologies to discuss how they constitute both European and Indigenous legal traditions. Before exploring my case studies, I also examine how these differences in land ontologies were used to delegitimise Indigenous legal traditions and dispossess Canadian First Nations of their land. Afterwards, I explore the legacy of *Delgamuukw* and discuss its pitfalls by analysing the political tensions surrounding the creation of the government-sanctioned Coastal GasLink Pipeline. Lastly, I conclude with some thoughts on the implications of applying an ontological reading to contemporary processes of decolonisation.

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[1] John Borrows, "Sovereignty's alchemy: An analysis of *Delgamuukw v. British Columbia*", *Osgoode Hall Law Journal,* 37, no. 3 (1999): 537-596.

Decolonial Literature Review

The politics and study of land ontologies in the context of settler-colonialism have been under-theorised. Engaging the lens of decoloniality, my paper seeks to address this gap. A decolonial approach allows for a critical examination of the "dark side of modernity" by recognising the experiences, histories, and beliefs of colonised peoples.[2] The decolonial method also explores how the production of knowledge has been influenced by colonial logics, ontologies, and power matrices; importantly, this process disrupts persistent settler-colonial logics which continue today.[3]

Within this paper, settler-colonialism will be defined as "a structure of exogenous domination in which Indigenous inhabitants of a territory are displaced by an outside population from an imperialist centre".[4] As this paper argues, colonial displacement extended beyond physical relocation and included the metaphysical world. Although colonialism and settler-colonialism have shared similar rationalities and practices, ultimately, what sets the two apart is the desire of settler-colonialism to establish a post-colonial state.[5] This difference continues to shape the present. With the prevalence of the "myth" of the existence of "post-colonial societies", contemporary Indigenous struggles for sovereignty are threatened through the distortion of the temporal experience of violence and dispossession.[6] Correspondingly, decolonisation can be understood as "the dismantling of the ideological and institutional structures of settler colonialism, which a de-colonial approach helps facilitate.[7] Tuck and Yang's famous statement, that "decolonisation is not a metaphor" is an important reminder, however, that, beyond an intellectual project, decolonisation encourages the "repatriation of Indigenous land and life".[8]

Patrick Wolfe is another key scholar whose insights have impacted the field of decoloniality studies. His concept of 'logics of elimination' traces the consistency between the once overt colonial practices of violence and modern manifestations of injustice.[9] Wolfe argues that the settler-colonial "logic of elimination" which "initially informed frontier killing" has since "transmuted into different modalities, discourses, and institutional formations as it undergirds the historical development and complexification of settler society" [10] Embedded in

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[2] Anibal Quijano, "Coloniality and Modernity/Rationality", *Cultural Studies* 21, nos. 2-3, (2007): 172.
[3] *Ibid.*
[4] Paul Berne Burow, Samara Brock, Michael R. Dove, "Unsettling the Land: Indigeneity, Ontology, and Hybridity in Settler Colonialism," *Environment and Society* 9 (2018): 57.
[5] Lorenzo Veracini, '"Settler Colonialism': Career of a Concept," *The Journal of Imperial and Commonwealth History* 41, no. 2 (2013): 313-3.
[6] Veracini, Lorenzo. 2011. "Introducing Settler Colonial Studies," *Settler Colonial Studies* 1, no. 1 (2011): 3.
[7] Burow, Brock, Dove, "Unsettling the Land", 58.
[8] Eve Tuck, and K.Wayne Yang,. "Decolonization Is Not a Metaphor," *Decolonization: Indigeneity, Education and Society* 1, no. 1 (2012): 21.
[9] Patrick Wolfe, "Settler Colonialism and the Elimination of the Native," *Journal of Genocide Research* 8, no. 4 (2006): 402.
[10] *Ibid.*

the "logic of elimination" is the idea of a hierarchy that places settler-colonial society above Indigenous communities, the consequences of which are seen in the historical displacement and genocide of Indigenous people. The imposed superiority of settler-colonial society still exists, however, and operates covertly through apparatuses of the state such as legal institutions which favour Eurocentric legal logics over Indigenous legal traditions and land ontologies. Given the historical continuity of Indigenous dispossession and violence, Wolfe suggests we understand settler-colonialism as "a structure not an event".[11] Understanding settler-colonialism as a structure thus discredits the idea of 'post-colonial' societies and allows us to see modern manifestations of eliminatory rationalities and relations of power that continue to operate at the expense of First Nations people. Namely, as it relates to this paper, the way settler-colonial land ontologies are combined with the force of Canadian law to undermine Indigenous sovereignty.

Land Ontologies and the Role of Law

Tania Li has argued that land is an assemblage which can be understood by its ontologies, which she explains as the "the nature of its thing-ness" and "what it's good for–its values".[12] Although Indigenous ontologies are multiple, just as colonial attitudes are multiple, there are some key differences between colonial and Indigenous relationships with land. There are three main colonial land ontologies which stand out in relation to Indigenous ontologies: land as property, land as empty, and nature as universalistic.[13] These ontologies are wedded together through European capitalist ideology which values land for resource extraction, and commodification.[14] Thus, settler-colonial land ontologies which have viewed land as an object of conquest and possession directly oppose Indigenous land ontologies which seek to develop harmonious relationships with land.

In general, scholars of Indigenous studies have understood Indigenous ontologies of land to revolve around two main concepts: relationality and reciprocity.[15] Relationality is the idea that "all things exist in relatedness".[16] A relational reality binds species and land with each

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[11] Wolfe, Patrick.. *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999), 2.
[12] Tania Murray Li, "What Is Land? Assembling a Resource for Global Investment," *Transactions of the Institute of British Geographers* 39, no. 4 (2014): 589.
[13] Glen Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Patrick Wolfe, *Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event* (London: Cassell, 1999).
[14] Burow, Brock, Dove, "Unsettling the Land", 59.
[15] Lauren Tynan, "What Is Relationality? Indigenous Knowledges, Practices and Responsibilities with Kin." *Cultural Geographies* 28, no. 4 (2021): 597–610; Robin Wall Kimmerer, *Braiding Sweetgrass: Indigenous Wisdom, Scientific Knowledge and the Teachings of Plants* (Minneapolis, MN: Milkweed Editions, 2013).
[16] Tynan, "What Is Relationality?", 601.

other and is facilitated through spiritual ideas of animacy and life force.[17] These understandings ultimately constitute humans and non-humans "in much more complex ways than in simple biological terms".[18] This reflects Tynan's explanation of how reciprocity follows from relationality since "how the world is known" shapes "how we, as Peoples, Country, entities, stories and more-than-human kin know ourselves and our responsibilities to one another".[19] As such, Indigenous legal traditions express and find legitimacy through Indigenous land ontologies that value relationality and reciprocity.

Robert Cover's theory of law helps explain the co-constitutive nature between ontology and law. He explains that everyone "inhabit[s] a *nomos*- a normative universe. We constantly create and maintain a world of right and wrong, of lawful and unlawful, of valid and void [...] no set of legal institutions or prescriptions exist apart from the narratives that locate it and give it meaning".[20] Resultantly, both Indigenous and settler-colonial communities have created normative legal systems based on their ontological positions and normative worlds. An important difference in their expression, however, is the way that Indigenous legal customs rely on oral tradition expressed through stories, songs, and ceremonies that draw up environmental imagery in comparison to written accounts as used by the European legal tradition.[21] Since Canadian law draws primarily upon European legal tradition, the differences between Indigenous and settler-colonial normative universes act as a barrier for contemporary Indigenous land back claims.

Decolonial scholars have asserted the inextricable relationship between ontological occupation and European colonial expansion. The contemporary consequences of settler-colonial ontological occupation can be described through John Law's (2011) idea of a One-World World (OWW), a concept in which ontological diversity is sacrificed for singularity. In this reality, the settler-colonial world "has arrogated for itself the right to be 'the' world "and subject "all other worlds to its own terms or, worse, to non-existence; this is a World where only a world fits".[22] In the Canadian colonial context, the positioning of settler-colonial ontologies of land as superior to Indigenous ontologies was done in pursuit of a OWW and colonial acquisition. Furthermore, the imposition of Canadian law, which was transplanted through European colonisation, helped cement the foundation of the OWW by legitimising the

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[17] Sarah Hunt, "Ontologies of Indigeneity: The Politics of Embodying a Concept," *Cultural Geographies* 21, no. 1 (2014): 27.
[18] Kim TallBear, "Beyond the Life/Not-Life Binary: A Feminist-Indigenous Reading of Cryopreservation, Interspecies Thinking, and the New Materialisms," in *Cryopolitics: Frozen Life in a Melting World,* ed. Joanna Radin and Emma Kowal (Cambridge, MA: MIT Press, 2017), 187.
[19] Tynan, "What is Relationality?", 600.
[20] Robert Cover, "The Supreme Court 1982 term: Foreword: Nomos and narrative," *Harvard Law Review* 97, no. 1 (November 1983): 4.
[21] Law Commission of Canada, *Justice within: Indigenous legal traditions.* Government of Canada, last modified 2006, http://publications.gc.ca/site/eng/9.667883/publication.html?wbdisable=true.
[22] Arturo Andrés Hernández Escobar, "Thinking-feeling with the Earth: Territorial Struggles and the Ontological Dimension of the Epistemologies of the South," *Aibr-revista De Antropologia Iberoamericana* 11 (2016): 15.

destruction of Indigenous land ontologies and corresponding Indigenous legal traditions. For example, the Indian Act of 1876, was a piece of wide-ranging legislation that set in motion violent processes of control and assimilation through the construction of reservations, state residential schools for children, and the criminalisation of traditional sacred land practices.[23] The Act undermined Indigenous sovereignty through forced displacement and European cultural indoctrination as well as through the institutionalisation of a colonial governance and legal infrastructure. These institutions presumed Canadian sovereignty, ignored Indigenous sovereignty, and eroded the practice of their legal traditions.[24]

Delgamuukw v. British Columbia

The issue of unceded land lies at the heart of contemporary Indigenous land struggles and territorial disputes.[25] Most of the territory encompassed by the province of British Columbia was stolen, assumed to be a resource, so it was not signed over to colonial governments by the Indigenous peoples occupying that land.[26] Furthermore, the territories covered by treaties did not represent a relinquishing of Indigenous land rights but rather were reserved to be shared.[27] Since the beginning of British colonisation in the 19th century, the Gitxsan and Wet'suwet'en Nations have resisted land seizure and occupation by the Canadian federal government.[28] *Delgamuukw v. British Columbia* continued that struggle for state recognition of Indigenous land rights.

There are several signature achievements gained by the Gitxsan and Wet'suwet'en nations in *Delgamuukw* – two of which will be discussed and problematised in this section. Overriding the initial court ruling, the Supreme Court of Canada ruled that the provincial government of British Columbia had no right to extinguish Indigenous rights to ancestral territories pursuant to section 35 of the Constitution Act of 1982. This recognised aboriginal title as an "existing aboriginal right". While the case raised and clarified issues relating to Indigenous land title, such as the definition and content of Aboriginal title, it did not outright resolve these issues. While section 35 was discussed by courts to hold "a noble purpose" in pursuing Indigenous justice, the limited legacy of *Delgamuukw*, seen through the Coastal

[23] Law Commission of Canada, *Justice within,* Government of Canada.
[24] Michaela McGuire and Ted Palys. "Toward sovereign indigenous justice: On removing the colonial straight jacket," *Decolonization of Criminology and Justice* 2, no. 1 (2020): 77.
[25] Ashley DeMartini and Rosalind Hampton, "We Cannot Call Back Colonial Stories: Storytelling and Critical Land Literacy," *Canadian Journal of Education / Revue Canadienne de l'éducation* 40, no. 3 (2017): 247.
[26] Augusta Davis, "Unceded Land: The Case for Wet'suwet'en Sovereignty," Cultural Survival, last modified 2020, https://www.culturalsurvival.org/news/unceded-land-case-wetsuweten-sovereignty.
[27] Christopher F. Roth, "Without Treaty, without Conquest: Indigenous Sovereignty in Post-Delgamuukw British Columbia," *Wicazo Sa Review* 17, no. 2 (2002): 143.
[28] *Ibid.*

GasLink Pipeline, undermines the capacity of the Constitution Act to provide meaningful protection to First Nations people.[29]

Another key outcome of this case is the affirmation of oral history as admissible evidence to demonstrate Indigenous land ownership. Despite state-sanctioned practices of forced cultural assimilation, Indigenous oral history, which expresses legal tradition and reinforces human connection to the more-than-human world, persevered.[30] In the initial court ruling, McEachern CJ dismissed oral history as inadmissible evidence for proving Indigenous land ownership stating that "much evidence must be discarded or discounted not because the witnesses are not decent, truthful persons but because their evidence fails to meet certain standards prescribed by law".[31] McEachern CJ's statement is reminiscent of early tensions between settler-colonial and Indigenous ontologies of land that the successful construction of the OWW has distorted. I believe his analysis that the evidence is "exceedingly difficult to understand" best captures the underlying issue.[32] Through the institutionalisation of settler-colonial ontologies of land through law recognising land as property, the state can only recognise evidence of land ownership that conforms to this ontological position; this worldview, however, is fundamentally non-existent within Indigenous ontologies of land that value relationality and reciprocity. Instead, following Indigenous legal traditions, evidence of land occupation is told through stories because their orientation to land defies restrictive settler-colonial ontologies legitimised by a centralised legal system.

Although the Canadian Supreme Court eventually validated oral history as a an admissible form of evidence, the impact of this decision is still limited against the backdrop of larger colonial power dynamics of the state. Moulton supports this claim explaining, "Canada's colonial past and its adherence to a hegemonic and monolithic conception of law are co-constitutive of a process whereby the recognition of Indigenous law will always demand conformity with dominant political and legal discourses".[33] The limitations of the Delgamuukw decision can be explained by the very processes of Indigenous nations engaging with the Canadian legal system. In their attempt to "play by the rules" of Canadian law, Indigenous people's systems of governance and laws are placed as inferior to those of the state, allowing room for the assertion of the Crown's sovereignty. Furthermore, the Supreme Court of Canada ended its decision with the promise of a second trial.[34] After 24 years, this trial has

[29] Borrows, "Sovereignty's alchemy", 573.
[30] Law Commission of Canada, *Justice within,* Government of Canada.
[31] *Delgamuukw v. British Columbia* [1991] BCJ No 525 (QL), 49.
[32] *Ibid.,* 51.
[33] Matthew Moulton, "Framing aboriginal title as the (mis)recognition of Indigenous law," *University of New Brunswick Law Journal,* 67 (2016): 365.
[34] Roth, "Without Treaty," 160.

still not yet proceeded; this has left key issues unresolved and has left the First Nations peoples and their land open to exploitation.

The Coastal GasLink Pipeline

Despite the victory of the Delgamuukw decision, the ongoing issue of the Coastal GasLink Pipeline highlights how tensions between settler-colonial and Indigenous ontologies of land continue to affect Indigenous sovereignty. . Since land rights recognition and the exercise of these rights must occur within the framework of a colonial state, there is room for the state's interests to trump the rights of Indigenous people. Given the fundamental differences between settler-colonial and Indigenous land rights, it is no surprise that Indigenous nations are continually required to defend the land against predatory state interests that seek to exploit the land and its resources, including through the construction of pipelines.

Although the Delgamuukw decision recognised that the provincial government cannot extinguish the land rights of the Wet'suwet'en Nation, the lack of a second trial has resulted in the continued exploitation of land, guided by settler-colonial ontologies. As such, the TC Energy Corporation has received court approval for building the Coastal GasLink pipeline through Wet'suwet'en territory.[35] In the act of resistance, the Nation sought to halt the pipeline's construction and prevent workers from entering the territory through the construction of encampments. However, the Canadian Supreme Court's ruling against the Wet'suwet'en Nation in 2019 to block access to the pipeline embodies the state's disregard for Indigenous law and sovereignty. Additionally, Bill C-15, introduced in 2015, further reflects how the state has routinely disregarded Indigenous laws and sovereignty. Bill C-15 sanctioned the use of force against Indigenous activists who were preventing the pipeline's construction and has reflected how the law has been used to undermine Indigenous self-determination and support settler-colonial land ontologies for the OWW project (Armao 2021).[36]

Conclusion

The limited legacy of the Delgamuukw decision, and the Coastal GasLink speaks to the ways in which settler-colonial land ontologies continue to reflect the settler-colonial "logic of elimination". Ultimately, with limited ability for Canadian courts to bring about the

[35] C. Bellrichard and J. Barrera, "What you need to know about the Coastal GasLink pipeline conflict," CBC News, last modified 2020, https://www.cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-pipeline-1.5448363>
[36] Mark Armao, "Canada sides with a pipeline, violating Wet'suwet'en laws — and its own." Grist. last modified 2021. https://grist.org/indigenous/wetsuweten-land-defenders/.

“repatriation of Indigenous land and life,” through state recognition of Indigenous land rights, alternative decolonisation solutions are required to protect Indigenous sovereignty (Tuck and Yang 2020:21). As has been demonstrated, the interests of the state will always come before Indigenous land rights.

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